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Order 2001-7-12



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 20th day of July, 2001

Served: July 20, 2001

**2001 U.S.-ARGENTINA COMBINATION  
SERVICE PROCEEDING**

**Docket OST-2001-10198 - /**

**1999 U.S.-ARGENTINA COMBINATION  
SERVICE CASE**

**Docket OST-1999-6210 - 358**

**Application of**

**CONTINENTAL AIRLINES, INC.**

**Docket OST-2001-9853 - 6**

**for an exemption pursuant to 49 USC 40109  
(New York/Newark-Buenos Aires start-up delay)**

**Applications of**

**DELTA AIR LINES, INC.  
and**

**Docket OST-2001-9984 - 6**

**AMERICAN AIRLINES, INC.**

**Docket OST-2001-10008 - 6**

**under 49 USC 41102 and 41108 for certificates of  
public convenience and necessity and/or allocation  
of frequencies**

**ORDER DENYING EXEMPTION AND INSTITUTING PROCEEDING**

## **SUMMARY**

By this order, we deny the application of Continental Airlines, Inc. in the captioned docket to delay institution of its authorized New York/Newark-Buenos Aires scheduled combination services, and institute an expedited carrier selection proceeding to determine which carrier should be authorized to use seven weekly frequencies for U.S.-Buenos Aires service that become available on December 1, 2001.

## **BACKGROUND**

Under a November 2000 Exchange of Notes between the U.S. and Argentina, 14 additional frequencies became available for U.S. carrier U.S.-Argentina scheduled combination services. Under the agreement seven of these frequencies could be used beginning April 1, 2001 and seven would be available on December 1, 2001. By Order 2001-1-14, the Department selected Delta Air Lines to serve the Atlanta-Buenos Aires market using the seven weekly frequencies available in April and Continental Airlines to serve the Newark-Buenos Aires market using the frequencies available in December. In addition, the Department selected Continental, for services from Houston, as backup to Delta's award, and United Air Lines, for services from Los Angeles, as backup to Continental's award.

On June 6, Continental requested an exemption from the startup provisions of its award in order to delay implementation of its Newark-Buenos Aires service until December 1, 2002. Delta, American, and United oppose Continental's request. All three carriers state that they are prepared to use the frequencies on December 1, when they become available, and urge the Department to deny Continental's request. Delta proposes service from New York (JFK), American from Dallas/Ft. Worth, and United from Washington (Dulles). Delta filed a certificate and frequency allocation application in the captioned docket; American and United already hold the necessary underlying authority to serve their proposed markets on Route 389 and Route 632, respectively, and request the necessary frequency allocation for their proposed services.

In light of the pleadings in response to Continental's request, by Notice dated July 5, the Department required United to supplement the record to clarify whether it would use its backup award for service from Los Angeles, as authorized by Order 2001-1-14, if activated. United responded that it would not, but that it is prepared to use the frequencies for service from Washington (Dulles).

## **Responsive Pleadings**

American, Delta, United, Continental, Dallas/Ft. Worth (DFW), the Metropolitan Washington Airports Authority, and the Washington Airports Task Force have filed responsive pleadings with respect to the captioned applications.<sup>1</sup>

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<sup>1</sup> Some of these pleadings have been accompanied by motions for leave to file otherwise unauthorized documents. We will grant the motions.

All commenting parties oppose Continental's request to delay its start up of its Newark-Buenos Aires services, arguing that such a delay would waste valuable operating rights when other carriers have firm plans to use them. Delta, American, and DFW further contend that as a result of United's changed proposal, its backup award is no longer valid and that the Department should conduct a carrier selection proceeding to reallocate the frequencies. All of these parties urge us to institute and complete such a proceeding expeditiously so that the selected carrier will have sufficient time to promote the service for start up on December 1.

United agrees that Continental's request should be denied, and requests that the Department activate its backup award in the selection proceeding so that it can use the frequencies for U.S.-Argentina service in December. While noting that its backup award is for Los Angeles-Buenos Aires service, United requests that in activating the backup award the Department afford United the flexibility to use the frequencies at Washington (Dulles) rather than Los Angeles. United states that the current economic conditions in Argentina do not make operations from Los Angeles feasible at this time.

Continental maintains that the severe economic decline in Argentina makes it necessary for Continental to defer institution of its New York/Newark-Buenos Aires service. It states, however, that it remains eager to institute its services and will do so if economic conditions warrant earlier than December 2002. It further states that United's decision not to implement its backup award for Los Angeles service supports its assessment of the current market and casts serious doubt as to whether any of the other carriers will actually implement the services that they say they will on December 1. In this regard, Continental contends that the carrier proposals are intended to take frequencies away from Continental to enhance their own allocations and preclude the four-carrier competition in the market that the Department found to be in the public interest, and that the Department can preserve the benefits of competition by four U.S. carriers only by granting Continental's request for a temporary deferral of its startup for New York/Newark-Buenos Aires service. Rather than taking the "short-sighted" approach proposed by the incumbent carriers, Continental contends that the public interest would be better served if the Department retains the long-term structural importance that it has attached to competition by four U.S.-flag carriers in the market, and Argentina service at an additional U.S. carrier's hub.

DFW filed in support of American's Dallas/Ft. Worth proposal and the Washington Airports Task Force and the Metropolitan Washington Airports Authority (the Washington parties) support United's proposal for service from Washington (Dulles). Both DFW and the Washington parties cite the importance of the services proposed by American and United, respectively, to their communities and urge the Department to deny Continental's request and to reallocate the frequencies on an expedited basis to another airline.

### **Decision**

We have decided to deny Continental's exemption request and to institute a proceeding to reallocate the seven frequencies that become available for service on December 1. We are attaching to this order a supplemental evidence request for this proceeding and setting a

procedural timetable for the submission of evidentiary material so that we can complete this case in sufficient time for the selected carrier to promote and commence its services on December 1.

#### **A. Continental's Exemption Request**

The frequencies available under the November 2000 Exchange of Notes constitute valuable rights that we do not believe should be wasted. In this case, while we had selected Continental for services from Newark commencing in December, the carrier has made it clear that it is not in a position to use those frequencies, while other carriers have indicated that they are. In these circumstances and given the long delay requested by Continental, we are not persuaded that granting its request is in the public interest. We are mindful of the public benefits that supported our original selection of Continental for the December frequencies. Inherent in those findings, however, was an expectation that Continental would make timely and effective use of the rights when they became available. While Continental has cited the current economic conditions in Argentina to support its request, three other airlines have sufficient confidence in the market to seek reallocation of the frequencies for commencement of services in December when the rights become available. Taking all of these factors into consideration, we conclude that any long-term benefits to be achieved by permitting Continental to retain its allocated frequencies are outweighed by the public benefits that can be achieved in the near and long term by ensuring timely and effective use of these valuable service opportunities. We therefore will deny Continental's request for an exemption from the startup provisions of its New York/Newark-Buenos Aires certificate award. These same considerations persuade us that we should also withdraw our allocation of the frequencies to Continental in Order 2001-1-14 so that they will be available for use by another carrier for services commencing this December.

We note that in the *1999 U.S.-Argentina Combination Service Case*, Docket OST-99-6210 United was selected for services from Los Angeles as backup to Continental's award. United has requested that we activate its backup authority but states that it wants to use the frequencies for service from Washington (Dulles) rather than Los Angeles. We are unpersuaded by United's arguments that awarding it the seven weekly frequencies for its proposed Washington (Dulles)-Buenos Aires service is consistent with its backup award in the *1999 Argentina Case*, and that such service can be authorized without carrier selection procedures. Contrary to United's arguments, its backup award in Order 2001-1-14 was explicitly for service from Los Angeles. United has confirmed on the record that it is not prepared to use the frequencies for that service. In these circumstances, its backup award in the *1999 Argentina Case* is no longer applicable, we will deny its request to activate its backup award, and its proposal to use the frequencies for service from Washington (Dulles) must compete with the applications of the other carriers.

#### **B. New Proceeding**

Given the interest of other carriers in using the frequencies, and our desire to ensure that the selected carrier can commence its services in time for a December start up, we also find that it is in the public interest to institute an expedited carrier selection proceeding to reallocate the frequencies available in December to another carrier. In this regard, many of the parties have already provided considerable information with respect to their proposals and various arguments to support the selection of a particular carrier. In these circumstances, we believe that minimal additional information is required to develop a complete record. The additional evidentiary

information is set forth in the appendix to this order. To the extent that the information is already on the record, the parties may incorporate such information by reference. Moreover, as considerable information has already been filed, we intend to develop the record in two stages. We will provide, first, for the filing of the additional information listed in the appendix and, then, for the filing of responses to the additional evidentiary submissions. Parties will be free to provide briefing arguments at both stages as well as any additional information that they believe would be helpful to the Department in making its decision.

We emphasize that the evidence requested includes specific instructions regarding the type and format of the information to be submitted and, as noted below, the sources of information to be used. We view adherence to these directives as critical to our consideration of the proposals in carrier selection cases. We put all applicants in this case on notice that we expect full compliance with the evidentiary request appended in this order. Any carrier not complying in any material respect with our request will be subject to elimination from consideration for an award in this case.

To facilitate the parties' submissions, the Department will make available on the date of service of this order updated U.S.-Argentina traffic data. Specifically, the Department will make available O&D data for the period 1994-2000, and T-100 data for the period January 1998 through March 31, 2001.<sup>2</sup>

While American, Delta, and United already have submitted proposals, we will, given the circumstances now before us, also provide any other U.S. carriers interested in allocation of the December 1 frequencies an opportunity to file applications for award of the frequencies. Such applications, however, must be filed in the newly established docket in accordance with the procedural schedule set forth in this order.<sup>3</sup> The existing applicants may also amend their current proposals should they choose to do so. As the rights are available in December and it is our desire to make a timely allocation of the frequencies for services to commence on that date, we are prepared to entertain only applications for services that will commence this December.

It is our intent to issue a decision in this case promptly to facilitate commencement of services on the December 1 effective date. Indeed, all of the parties have urged us to complete reallocation of the available frequencies expeditiously so that the selected carrier will have sufficient time to plan and promote its service in time for a December start up and all have supported an expedited procedural schedule to achieve that goal. Accordingly, we will require that the applicant carriers file the requested supplementary information within 10 days of the date of service of this order. We will require that responses to those submissions be filed within seven calendar days

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<sup>2</sup> The data will be available on diskette. Parties should contact the Office of Aviation Analysis for distribution of the data at 202-366-2352.

<sup>3</sup> In its June 28 Consolidated Response, Delta also filed a motion to consolidate the pending applications for reallocation of Continental's frequencies. We will grant the motion. As noted below, we have consolidated the pending requests of the American, Delta, and United into the new proceeding instituted by this order. All further pleadings by these carriers with respect to their requests should be filed in the newly established docket.

thereafter.<sup>4</sup> Given the material that has already been filed and the limited additional information being requested, we believe that this procedural schedule will provide all parties sufficient time to prosecute their applications and to develop a complete record for the Department's decision. To the extent that civic parties wish to submit information on the record, such submissions should be filed in accordance with the procedural schedule set forth above and served on all parties.

We intend to make our decision based on the material already on the record and filed in response to this order using written, show-cause procedures. We find no material issues of fact that would warrant an oral evidentiary hearing in this case, and we note that none of the carriers that have sought the frequencies has requested oral, evidentiary procedures. We are confident that the issues in this case can be addressed adequately on a written record.

In determining which carrier(s)/gateway(s) should be authorized, our principal objective will be to maximize the public benefits that will result from award of the authority in this case. In this regard, we will consider which applicants will be most likely to offer and maintain the best service for the traveling and shipping public, and are demonstrably prepared to use the frequencies when they become available. We will also consider the effects of the applicants' service proposals on the overall market structure and the level of competition in the U.S.-Argentina market, and on any other market shown to be relevant, in order to promote an air transportation environment that will sustain the greatest public benefits. In addition, we will consider other factors historically used for carrier selection where they are relevant. In order to ensure that these valuable route rights are not wasted, we intend to issue backup authority in this proceeding should the selected carrier not operate the proposed services.

#### **ACCORDINGLY,**

1. We institute the *2001 U.S.-Argentina Combination Service Proceeding*, Docket OST-2001-10198, to be decided by non-oral, show-cause procedures under Rules 207 and 210 of our regulations (14 CFR 302.207 and 302.210);
2. The proceeding instituted in ordering paragraph 1 will consider which primary and which backup carrier should be allocated the seven weekly frequencies for U.S.-Argentina scheduled combination services available December 1, 2001, and (as necessary) underlying certificate authority, and what terms, conditions, and limitations, if any, should be imposed on any authority awarded in this proceeding;

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<sup>4</sup> All dates are delivery dates and all submissions must be filed in the docket assigned to this proceeding. An original and five copies of all submissions are to be received by the Department of Transportation Dockets no later than the dates indicated. In the alternative, filers are encouraged to use the electronic submission capability through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site. For the convenience of the parties, service by facsimile or email is authorized. Parties should include their fax numbers/email addresses on their submissions and should indicate on their certificates of service the methods of service used.

3. We consolidate the certificate and/or frequency allocation applications of American Airlines, Inc. in Docket OST-2001-10008, Delta Air Lines, Inc. in Docket OST-2001-9984, and United Air Lines, Inc., in Docket OST-99-6210 into the proceeding instituted in ordering paragraph 1, above;
4. We require that the additional evidentiary submissions requested in this order and any additional or amended applications be filed within 10 days of the date of service of this order and that any answers to those submissions be filed within 7 calendar days thereafter;
5. We deny the application of Continental Airlines, Inc. in Docket OST-2001-9853 for exemption from the startup provisions of its New York/Newark-Buenos Aires certificate authority granted by Order 2001-1-14;
6. We rescind our allocation in Order 2001-1-14 of seven weekly frequencies to Continental Airlines, Inc. for New York/Newark-Buenos Aires service;
7. We deny the application of United Air Lines, Inc. in Docket OST-1999-6210 to activate its backup award issued by Order 2001-1-14;
8. We grant the June 28, 2001 Motion to Consolidate filed by Delta Air Lines, Inc.;
9. We grant all motions for leave to file otherwise unauthorized documents in the captioned dockets;
10. Petitions for reconsideration of this order are due no later than 3 calendar days from the date of service of this order; answers to petitions are due no later than 2 calendar days thereafter; and
11. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; and all other U.S. certificated carriers holding foreign scheduled authority to operate transoceanic aircraft; the Dallas/Ft. Worth parties; the Washington Airports Task Force; the Metropolitan Washington Airports Authority; Regional Business Partnership (Newark); Los Angeles World Airports; the Ambassador of Argentina in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

**SUSAN McDERMOTT**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:  
[http://dms.dot.gov/reports/report\\_aviation.asp](http://dms.dot.gov/reports/report_aviation.asp)*

## SUPPLEMENTAL EVIDENTIARY REQUEST

In responding to this evidence request, all parties are advised to heed the admonitions and notice regarding compliance contained in the attached order. The base year for developing forecast data should be calendar year 2000. The forecast year for the submission of the following evidentiary information should be calendar year 2002:<sup>1</sup>

- (a) Firm date for instituting service in the market;
- (b) Single-Plane and nonstop-to-nonstop round-trip connecting schedules proposed to be operated in the forecast year; if carriers intend to offer seasonal service only, they must so specify and specify the period during which the seasonal service would be offered;

Schedules should contain flight numbers, complete routings from origin to destination (including behind-gateway and beyond-gateway points), departure and arrival times, equipment types (including seat configuration by class of service), days scheduled, classes of service offered, and the limitations, if any, on the number of seats available for each class of service;

- (c) Separate passenger traffic forecasts on an O&D market-by-market (city-pair) basis (single-plane and round-trip on-line connecting and, to the extent possible, interline connecting) for the forecast year for each market on the proposed routing. The forecasts should be based upon the applicant's proposed schedules and should detail specifically the data sources of all traffic. Include any anticipated traffic changes in other markets on the applicant's existing system, but not limited to, diversion and service level/aircraft changes as a result of the proposal in this case. The basis for any forecasting technique used should be clearly explained. Indicate any anticipated seasonal fluctuations;<sup>2</sup>

- (d) Estimated number of gallons of fuel to be used in the proposed service annually;
- (e) A statement as to whether or not the aircraft to be used in the proposed service are on hand or on order. If on hand, indicate where and to the extent to which those aircraft are currently being used. If on order, provide assurance that the aircraft will be available on the carrier's proposed startup date for its Argentina service;

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<sup>1</sup> The original filing should be on 8½" X 11" white paper using dark ink (not green) and be unbound without tabs, which will expedite use of our docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability available through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions in the web site.

<sup>2</sup> To facilitate review of the data, to the extent possible, please also include this data on CD Rom or zip disks. Use floppy disks only if no other format is available. If you have any questions, please call the Office of Aviation Analysis at 202-366-2352.



**Appendix**

(f) Where applicable, a statement confirming that the carrier holds the necessary slots to operate the proposed service at its proposed U.S. gateway for services commencing this December. If the carrier does not hold the necessary slots, provide assurance that the carrier will be able to obtain such slots for operation of service commencing this December;

(g) A description, including a timetable, of the carrier's plans to prepare for and promote the proposed services in time for a December 2001 start up, including, but not limited to, inclusion of the service in the *Official Airline Guide* and computer reservation systems; printing and distribution of other promotional material, preparation and submission of any necessary regulatory filings with Argentina; and adjustment to the carrier's current schedules to incorporate the new service;

(h) A statement as to whether the services proposed will be operated under a code-share arrangement with a foreign carrier whereby the foreign carrier's code will be marketed on the U.S. carrier flights. To the extent that the service will include code-share operations, the applicant should clearly separate the traffic it expects to receive from its foreign carrier partner under the service proposal for its U.S.-Argentina service. Similarly, if the U.S. carrier also intends to hold out service from its proposed gateway on services operated by its foreign code-share partner, the U.S. carrier should fully describe those operations and provide a separate traffic forecast for its services under each operational arrangement.

(i) A statement as to whether the carrier would accept a backup award if not selected for the primary award in this case. If so, will the carrier accept such an award under conditions that (1) permit it to implement the award within the first year should the primary carrier not institute service or withdraw from the market, and (2) expires at the end of one year if not activated?

(j) If selected for the primary award, will the carrier accept a condition that requires it to commence service by a date specified by the Department? If so, what date should the Department specify? In this regard, as noted in the text of this order, we intend only to consider proposals that provide for service commencing on December 1 or shortly thereafter.